BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ALFREDO JUAREZ	)	
Claimant	)	
VS.	)	
	)	Docket No. 242,177
ROCK CONSTRUCTION COMPANY and	)	
SCHELLENBERG & WALDSCHMIDT	)	
Respondents	)	
AND	)	
	)	
ZURICH INSURANCE COMPANY	)	
Insurance Carrier	)	
AND	)	
	)	
WORKERS COMPENSATION FUND	)	

ORDER

Claimant appealed the February 26, 2002 Award entered by Administrative Law Judge John D. Clark. The Board heard oral argument on August 16, 2002, in Wichita, Kansas.

APPEARANCES

Gerard C. Scott of Wichita, Kansas, appeared for claimant. Joseph Seiwert of Wichita, Kansas, appeared for Rock Construction Company. Clinton D. Collier of Kansas City, Missouri, appeared for Schellenberg & Waldschmidt and its insurance carrier Zurich Insurance Company. E. L. Lee Kinch of Wichita, Kansas, appeared for the Workers Compensation Fund.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant alleges that on December 15, 1998, he fell while working on stilts installing drywall. Claimant also alleges that his symptoms progressively worsened as he continued to work through February 19, 1999, when his pain prevented him from continuing to work. Claimant requests benefits either from Rock Construction Company (Rock) as his immediate employer or from Schellenberg & Waldschmidt (S & W) as Rock's principal contractor. In the alternative, claimant requests benefits from the Workers Compensation Fund (Fund) under the theory that Rock is uninsured and insolvent.

In the February 26, 2002 Award, Judge Clark denied claimant's request for benefits from Rock based upon the finding that Rock did not have a sufficient payroll to come under the provisions of the Workers Compensation Act. Based on that finding, the Fund was not responsible for providing benefits to claimant. The Judge also denied the request for benefits from S & W based upon the finding that claimant's date of accident was the last day that he worked for Rock, or February 19, 1999, and that Rock was not a subcontractor for S & W on that date. Accordingly, the Judge denied all of claimant's requests for benefits in this claim.

Claimant contends the Judge erred. At oral argument before the Board, claimant argued Rock had a sufficient payroll and, therefore, his accident is compensable under the Workers Compensation Act. In his submission letter, claimant also argued that he had sustained two accidents, the first being December 15, 1998, and the second being the series of mini-traumas that aggravated claimant's condition through his last day of work on February 19, 1999. Therefore, claimant challenges the finding that the appropriate date of accident in this claim is February 19, 1999.

Claimant argues the Board should reverse the Award and grant him benefits. Claimant requests the following: (1) temporary total disability benefits from February 19, 1999, to October 1, 1999; (2) a 10 percent permanent partial general disability based upon the whole body functional impairment rating provided by Dr. Pedro A. Murati; and (3) medical benefits. Claimant suggests the Board should place liability on S & W or, in the alternative, the Board should apportion liability with the bulk going to S & W and the remainder to the Fund.

On the other hand, S & W and its insurance carrier contend the appropriate date of accident in this claim is February 19, 1999. Moreover, they argue that Rock was not working for S & W as a subcontractor on that date and, therefore, S & W and its insurance carrier should not be liable for claimant's work-related injury. S & W and its insurance carrier request the Board to affirm the Award.

The Fund contends it should not be responsible for claimant's injury as Rock did not have a $20,000 payroll for 1998, nor did Rock reasonably expect that it would have a $20,000 payroll for 1999. Accordingly, the Fund argues claimant's accident is not compensable under the Act and, therefore, it has no liability to claimant in this proceeding. In the alternative, the Fund argues the evidence fails to prove that Rock is insolvent or unable to pay the workers compensation benefits that claimant may be awarded.

Finally, Rock also requests the Board to affirm the Award and deny claimant's request for benefits.

The issues before the Board on this appeal are:

1. What is the appropriate accident date for this claim?

2. Did Rock Construction Company have a $20,000 or more payroll for the year before claimant's accident or could the company reasonably have estimated that it would have a $20,000 or more payroll for the year during which the accident occurred?

3. If so, what is the nature and extent of claimant's injury and disability?

4. Is claimant entitled to receive temporary total disability benefits and, if so, for what period?

5. Which party is responsible for claimant's workers compensation benefits?

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

1. Claimant worked for Mr. Alvaro Arevalo, who conducted business as Rock Construction Company. On December 15, 1998, claimant was working on stilts applying mud to a ceiling when he stepped in sheetrocking mud, slipped, and fell backward to the floor. Soon afterwards, Mr. Arevalo appeared saying he had heard claimant fall and asked claimant if he was all right. Mr. Arevalo also asked claimant what had happened and if he had fallen, and claimant answered that he had but he was all right.

2. Claimant continued working his normal job duties and several days later began experiencing pain in his leg. Claimant informed Mr. Arevalo about his symptoms but he did not initially relate his leg pain to the fall. As claimant continued to work, his symptoms worsened. As he did not know what was causing his leg pain, claimant did not ask for medical treatment but sought treatment on his own. The record is not entirely clear but,

according to claimant, he began seeking medical treatment for his symptoms in either late December 1998 or early January 1999.

3. By approximately February 19, 1999, claimant's symptoms had worsened to the point he could no longer work. That is the last day claimant worked for Mr. Arevalo. On February 25, 1999, claimant had an MRI that revealed a herniated disc in claimant's low back. Claimant ultimately sought treatment from Dr. Eustaquio Abay, who operated on claimant's back in July 1999.

4. Mr. Arevalo's Rock Construction Company provided drywall services. Rock provided claimant with the tools and all the materials to perform his job. All the work came from and all job assignments were made by Mr. Arevalo. Claimant did not work alone. Rather, claimant worked as part of a crew of workers, all of whom were hired by Mr. Arevalo and Rock. Claimant neither selected nor hired his coworkers. Claimant neither controlled nor supervised his coworkers. Mr. Arevalo did. Mr. Arevalo told claimant where to work, who to work with, and what time to begin and stop working. All of these factors are consistent with an employer-employee relationship.

5. Mr. Arevalo began Rock Construction Company in approximately April 1998. In approximately October 1998, Mr. Arevalo hired workers to assist him.

6. Mr. Arevalo filed federal tax documents showing that he operated his business as a sole proprietorship. According to the 1998 tax documents, Mr. Arevalo claimed $21,289 in gross receipts and $16,066 in expenses, leaving a net profit of $5,223.

On those 1998 tax documents, Mr. Arevalo indicated that he paid nothing in wages but he claimed $7,072 for contract labor. Other records introduced at Mr. Arevalo's December 2001 deposition indicate that he paid three workers a total of $1,995 in October 1998, three workers (one of whom was claimant) a total of $3,135 in November 1998, and three workers (one of whom was claimant) a total of $4,065 in December 1998.

Based upon this evidence, the Board finds that Mr. Arevalo paid less than $20,000 in payroll for the 1998 calendar year.

7. Mr. Arevalo's tax records for 1999 indicate that Rock had $103,582 in gross receipts and $98,437 in expenses, leaving a net profit of $5,145.

Those tax records also indicate that Mr. Arevalo paid wages of $17,155 and $23,464 for contract labor, which included all the money paid claimant during that year. Other documents introduced at Mr. Arevalo's December 2001 deposition indicate that in January 1999 Mr. Arevalo paid claimant $1,041.50, in February 1999 Mr. Arevalo paid claimant

$1,200, and in March 1999 Mr. Arevalo paid claimant $150. Accordingly, in the calendar year 1999 Rock paid claimant a total of $2,391.50.

According to Mr. Arevalo, he ceased doing business in March 1999 and began working for someone else. Mr. Arevalo testified that when he ceased doing business in March 1999 he had only paid out $2,391.50 for labor, which he had paid to claimant. In approximately August 1999, Mr. Arevalo recommenced business operations. But this time, Mr. Arevalo obtained workers compensation insurance, which he had not previously obtained.

Mr. Arevalo testified that he paid the $17,155 in wages to employees that he hired when he recommenced business operations in the latter part of 1999.

Based on the above evidence, the Board finds Mr. Arevalo could not reasonably have estimated that his payroll would have reached $20,000 for the 1999 calendar year at any time before recommencing business in August 1999.

8. Tax records for 2000 indicate that Mr. Arevalo received $240,891 in gross receipts compared to $216,149 in expenses, leaving a net profit of $24,742. According to Mr. Arevalo, his 2000 gross receipts significantly increased as he had obtained a contract for work on a large apartment complex.

9. As of his December 2001 deposition, Mr. Arevalo was down to two employees and performing work on houses. As of that time, Mr. Arevalo owned two vehicles, had $38 in his bank accounts and had approximately $4,000 in accounts receivable.

10. At the time of claimant's December 15, 1998 fall, Rock was working as a subcontractor for Schellenberg & Waldschmidt. Rock completed the work that it was performing for S & W and by sometime in January 1999 moved on to other projects. The evidence indicates that from approximately January 21, 1999, through claimant's last day of work on February 19, 1999, Rock was no longer working for S & W but, instead, performing work for individual homeowners. And during that period, claimant's symptoms worsened to the point that he could no longer perform his sheetrock work.

11. According to Dr. Pedro A. Murati, claimant now has a 10 percent whole body functional impairment due to his low back injury. That rating is pursuant to the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). Dr. Murati's functional impairment rating is uncontradicted.

Although the doctor initially provided an opinion that claimant's back injury was due to the December 15, 1998 accident, on cross-examination the doctor stated that claimant's

work and repetitive lifting as a sheetrocker could cause a repetitive or cumulative type injury. The doctor testified, in part:

> Q. (Mr. Sanderson) So given the emergency room records, the back pain increasing within a week of February 24th of 2000 *[sic]*, would that indicate to you to be more of a repetitive type injury, more of a cumulative type injury?
>
> A. (Dr. Murati) Well, let's say for argument's sake that his history whether it happened in November or December is accurate, that he believes his pain started then and he was able to work, and then subsequent to his work his back got worse, yes, I would have to say yes to your question. It would come from maybe initially he got it hurt down there but then he repetitively aggravated it until the point that he needed to seek medical treatment.[1]
>
> . . . .
>
> Q. So given the history that you've taken then, you feel it would be a more accurate statement that as a result of his continuous work activities up through February 24 [1999], that would be the date that he was unable to work?
>
> A. Yes.
>
> Q. And each and every day that he continued his work activities through February 24th was an incident or a trauma?
>
> A. Well, a series of incidents and micro[-]traumas, yeah.[2]

CONCLUSIONS OF LAW

On December 15, 1998, claimant sustained personal injury by accident arising out of and in the course of employment with respondent. Claimant immediately notified Mr. Arevalo about the accident. At the time of the accident, claimant was an employee of Mr. Arevalo, who was doing business as Rock Construction Company.

Based upon Dr. Murati's testimony that claimant sustained a series of micro-traumas through his last day of working for respondent, the Board finds that claimant has sustained a repetitive type injury and, therefore, the appropriate date of accident is governed by the

[1] Murati Depo. at 18-19.

[2] Murati Depo. at 20-21.

Treaster[3] case, in which the Kansas Supreme Court held that the appropriate date of accident for injuries caused by repetitive use or micro-traumas is the last date that a worker either (1) performs services or work for an employer or (2) is unable to continue a particular job and moves to an accommodated position. *Treaster* can also be interpreted as focusing upon the offending work activity that caused the worker's injury as it holds that the appropriate date of accident for a repetitive use injury can be the last date that the worker performed his or her work duties before being moved to a substantially different accommodated position.

> Because of the complexities of determining the date of injury in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case that is the direct result of claimant's continued pain and suffering, the process is simplified and made more certain if the date from which compensation flows is the last date that a claimant performs services or work for his or her employer or is unable to continue a particular job and moves to an accommodated position.[4]
>
> Where an accommodated position is offered and accepted that is not substantially the same as the previous position the claimant occupied, the date of accident or occurrence in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case is the last day the claimant performed the earlier work tasks.[5]

In *Treaster*, the Kansas Supreme Court also approved the principles set forth in *Berry*,[6] in which the Kansas Court of Appeals held the date of accident for a repetitive trauma injury is the last day worked when the worker stops working due to the injury.

Claimant continued to sustain injury while working for Mr. Arevalo through his last day of work. Accordingly, the appropriate date of accident is claimant's last day of working for Mr. Arevalo on approximately February 19, 1999.

The Board concludes Schellenberg & Waldschmidt is not responsible for claimant's injuries as Mr. Arevalo doing business as Rock Construction Company was no longer working for S & W as a subcontractor on claimant's last day of work. In fact, as indicated above, by January 21, 1999, Mr. Arevalo had completed his subcontracting work for S & W and had moved on to other projects.

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[3] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

[4] *Id.* syl. ¶ 3.

[5] *Id.* syl. ¶ 4.

[6] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

Claimant may not proceed against either Mr. Arevalo or Rock Construction Company under the Workers Compensation Act. The Board concludes the evidence fails to establish either Mr. Arevalo had a payroll of at least $20,000 for 1998 or that at any time before August 1999 Mr. Arevalo would have reasonably estimated that his payroll would reach $20,000 for the calendar year 1999. Therefore, at the time of claimant's fall in December 1998 or his last day of work in February 1999, Mr. Arevalo doing business as Rock was not subject to the provisions of the Act.[7]

Based upon the above conclusion, the Workers Compensation Fund is not liable to claimant under the theory that Mr. Arevalo and Rock are uninsured and insolvent and, therefore, unable to pay any award of workers compensation benefits. The Fund's liability is, generally, derivative and dependent upon the liability of the employer.[8] Accordingly, because Mr. Arevalo doing business as Rock is not liable to claimant under the Workers Compensation Act, neither is the Fund.

Accordingly, claimant's request for benefits under the Workers Compensation Act should be denied in all respects.

The Board adopts the findings and conclusions set forth by the Judge to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, the Board affirms the February 26, 2002 Award entered by Judge Clark. Claimant's request for benefits is denied.

IT IS SO ORDERED.

[7] See K.S.A. 1998 Supp. 44-505(a).

[8] See *Arduser v. Daniel International Corp.*, 7 Kan. App. 2d 225, 640 P.2d 329, *rev. denied* 231 Kan. 799 (1982).

Dated this ____ day of October 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I respectfully disagree with the majority and would find that claimant's date of accident was December 15, 1998, with claimant's worsening symptoms a natural consequence of that accident. Dr. Murati described how the interior of a disc is a jellylike substance that can seep through a tear in the annular ligament. The doctor testified, in part:

> Q. (Mr. Sanderson) Generally when you have a disc that has been injured, could you describe the physiology or the anatomy of the disc material?
>
> A. (Dr. Murati) Well, the disc material inside the disc is a jelly substance.
>
> . . . .
>
> A. And it's surrounded essentially with what really for all practical purposes is the same as a radial tire. You have the annular ligament and it runs crisscross different layers, and you can either have a complete tear of the annular ligament with extruded disc material outside, that would be the more -- the worst type of injury, or you could have a slight tear of the annular ligament which heals or which does not heal and progressively gets worse until the point that you need surgery to fix it.
>
> Q. So perhaps the annulus tears and some of the jelly like substance, it doesn't extrude at one point but as one continues to work the jelly, the disc material inside migrates; correct?
>
> A. It could migrate, it could seep out and irritate the nerve fibers in the annular ligament that's richly innervated by pain fibers or it could seep out and irritate the nerve roots.

> Q. And as that migrates out or seeps out, then you would expect someone if that impinged on the nerve root of the thecal sac that would cause --
>
> A. Pain.[9]

Claimant had worked as a sheetrocker for several years before the December 1998 accident and did not experience any back symptoms or radiating pain in his legs. I find it more than coincidental that claimant's symptoms began shortly after the December 1998 fall at work. I also find it more probably true than not that claimant tore the annular ligament in that fall and then experienced the pain into his leg as the disc material seeped through the annular tear as he continued to work. Moreover, I would find the symptoms that claimant experienced following the December 1998 fall were part and parcel of the accidental injury sustained in the fall. Accordingly, I would hold Schellenberg & Waldschmidt responsible for claimant's back injury.

BOARD MEMBER

c: Gerard C. Scott, Attorney for Claimant
Joseph Seiwert, Attorney for Rock Construction Company
Clinton D. Collier, Attorney for S & W and Zurich Insurance Company
E. L. Lee Kinch, Attorney for Fund
John D. Clark, Administrative Law Judge
Director, Division of Workers Compensation

[9] Murati Depo. at 19-20.